No. 9779.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FANCHON & MARCO, INC., a corporation,

Appellant,

vs.

HAGENBECK-WALLACE SHOWS COMPANY, a corporation,

Appellee.

APPELLEE'S ANSWERING BRIEF.

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APPELLEE'S ANSWERING BRIEF.

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

This appeal was taken by Fanchon & Marco, Inc., a California corporation, from a judgment in favor of Hagenbeck-Wallace Shows Company, an Indiana corporation, in the amount of $15,006.07, awarded after a trial by Court, jury trial having been waived. The complaint in this matter alleges that plaintiff and defendant are respectively corporations organized under the laws of the States of Indiana and California and that the amount involved in this action exceeds the sum of $3000.00. It alleges the execution on May 22, 1939, of a contract between the parties hereto, attached to the complaint as Exhibit "A". It alleges performance by the plaintiff in conformity with the terms thereof of the delivery at Inglewood, Cali-

fornia, of certain circus property, equipment and animals covered by the said contract, the acceptance thereof by defendant under the terms of the contract and the repudiation, after more than one week's use of said equipment, of the contract and the return of the equipment to the winter quarters of plaintiff. It alleges that plaintiff suffered damages in the amount of $1600.00, cost of feeding and caring for animals and equipment for four weeks remaining under said contract after repudiation thereof by defendant, and the failure to pay five items of $2500.00 each, being the five weekly rental payments due under the contract. In addition thereto, the plaintiff seeks recovery of interest on the unpaid sums, as provided by law, and for other items particularly appearing in the complaint, demand for the same and default on the part of defendant having been alleged. There were two common counts in the complaint which were dismissed at the pre-trial hearing. The defendant's answer denies the obligations as due, alleges that the equipment was not in good condition and ready for use for circus purposes when delivered, as required under the contract, and sets up several affirmative defenses, including fraud and misrepresentation in connection with the condition of the equipment at the time the contract was entered into, failure of consideration in connection therewith and impossibility of adaptation of the equipment delivered by plaintiff to the use for which defendant contracted for the same. In addition, a counterclaim on behalf of the defendant was filed, alleging in substance that the condition of the equipment was not as required by the contract, and that the defendant suffered damages in the sum of $2500.00 for repairs in connection with the same, and for $50,000 for loss of profits as a result of its inability to use the same.

A reply to the counter-claim was filed. Later the counter-claim was amended and a reply to the amended counter-claim in substance denying the allegations therein contained was filed.

The action was commenced in the United States District Court, in and for the Southern District of California, Central Division, and the pleadings were at issue in that Court. The statutory provision believed to sustain the jurisdiction of the District Court is 28 U. S. C. A., Sec. 41 (1). The statutory provision giving this Honorable Court jurisdiction on appeal to review a judgment of the District Court is 28 U. S. C. A., Sec. 225, Par. a.

The pleadings necessary to show the existence of jurisdiction are the complaint [Pr. Tr. pp. 2 to 14], the answer and counter-claim of defendant Hagenbeck-Wallace Shows Company [Pr. Tr. pp. 14 to 26], plaintiff's reply to the counter-claim [Pr. Tr. pp. 26 to 28], defendant's amended counter-claim [Pr. Tr. pp. 28 to 32], and the reply to amended counter-claim [Pr. Tr. pp. 32 to 35].

A pre-trial was had and the issues defined in the Order on pre-trial [Pr. Tr. pp. 35, 36] and the Certificate of pre-trial hearing under Rule 16 [Pr. Tr. pp. 36 to 39] and confined the issues to the condition of the equipment when delivered to the defendant and to losses, if any, recoverable that were occasioned by the deficiency of the equipment, if any. The judgment was entered in the District Court on December 3, 1940 [Pr. Tr. p. 46]. Notice of Appeal was filed by appellant on the 16th day of January, 1941 [Pr. Tr. p. 48]. Bond on appeal in the sum of $20,000.00, covering both judgment and costs, was filed by appellant on January 16, 1941 [Pr. Tr. p. 49].

The typewritten transcript of record was filed and docketed in this Honorable Court on the 29th day of March, 1941 [Pr. Tr. p. 285], within the time allowed for the docketing of said transcript. Thereafter, the printed transcript of record was prepared pursuant to a designation of record on appeal and amended designation of record on appeal, in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, the designation having been filed on the 12th day of March, 1941 [Pr. Tr. p. 52] and the amended designation having been filed on the 13th day of March, 1941 [Pr. Tr. p. 54]. A designation of parts of records necessary for consideration of this case pursuant to Rule 19, Subdivision 6, of this Honorable Court, was filed in conformity with said rule [Pr. Tr. pp. 287 to 291]. An appellee's designation of documents, records and proceedings to be included in record on appeal and to be included in the printed transcript thereof was filed in the manner provided by the Rules of Court in connection with the same by appellee on April 2, 1941 [Pr. Tr. pp. 291 to 294].

The statement of points relied upon by the appellant was filed at the same time and as a part of the Appellant's designation of parts of record, on the 2nd day of April, 1941 [Pr. Tr. p. 286].

The transcript of record was filed in this Honorable Court on the 29th day of March, 1941, and all proceedings have been taken within the time provided by the Rules of Court and the provisions of 28 U. S. C. A., Sec. 230.

Statement of the Case.

There are a number of statements in Appellant's Statement of the Case which under Rule 20, Sub. 3 of the Rules of this court, Appellee controverts. Therefore we are setting out herewith Appellee's Statement of the Case.

The Appellee in this case is an Indiana corporation, and is engaged in the circus business, and in April and May of 1939 had on hand in its winter quarters at Baldwin Park, California, a large amount of circus equipment, including performing animals, elephants, etc., which it was willing to lease.

The Appellant is also a corporation incorporated in the State of California, and is engaged in the general show or public amusement business, and during the months of April and May, 1939, decided to put on a circus in California to be known as the Great American Circus, for an indefinite number of weeks but not less than five weeks, and from May 2, 1939, to May 19, 1939, Appellant contracted with a number of sponsors in various California cities to put on a three-ring circus. Nine such contracts were made prior to May 22, 1939 and four made after May 22, 1939, up to and including May 29, 1939.

Negotiations were carried on between Ralph Clawson, the local manager representing Appellee, and Charles W. Nelson, booking agent for Appellants, Daillard, the appointed general manager for the Great American Circus and Marco Wolff, the vice-president of Fanchon & Marco, the Appellants, in relation to leasing a part of the circus

equipment held by Appellee in its winter quarters at Baldwin Park, California, sufficient in kind and variety, including 10 elephants and other animals, to enable the Appellants to put on a three-ring circus in conformity with their contracts with the sponsors.

During these negotiations, the Appellants' agents Daillard and Nelson, visited the location of the equipment accompanied by Mr. Clawson, and on May 18, 1939, the Appellants employed George Singleton, of 40 years experience in the circus business and a former employee of Appellee, as a "boss canvasman" in charge of the "big top" and all the equipment, including poles, ropes, chairs, chains, wires, blocks, falls and tackles, and instructed him to go to Baldwin Park and start laying out the equipment needed and to employ the necessary men to assist him in the matter.

The next day, or on May 19, 1939, Appellants hired as manager Paul Eagles, a circus man of 25 years' experience, to take charge of selecting the equipment and to obtain skilled men to take charge of the various departments of the circus and to manage the same.

The local manager and agents of both parties could not come to an agreement, and the Eastern representatives of both parties were consulted at New York, who finally on May 22, 1939, two days before the circus was to open in Inglewood, entered into the written lease agreement which is set out in full in the printed transcript. While the contract was made in New York it was to be performed solely in California.

In the meantime the entire equipment had been inspected and selected and the "big top" had been erected by Singleton and his crew at Baldwin Park, and upon the signing of the agreement was immediately torn down and the circus transported to Inglewood for the opening show on May 24, 1939.

The equipment was transferred by the leased circus train, but the Appellants were informed by the Santa Fe officials that certain repairs were needed to the train to conform to certain Interstate Commerce rules. Marco Wolff, the vice-president of the Appellants, after consultation and agreement with Clawson, the agent of Appellees, hired the repairs made by the Santa Fe Railroad and charged the expense to Appellee. In a like manner certain other minor repairs were made and minor articles purchased, and the expense charged to Appellee.

The Great American Circus showed in Inglewood May 24, 1939, two performances; San Diego, May 26-27-28, 1939, five performances; Santa Ana, May 29, 1939, one performance; Pasadena, May 30, 1939, one performance, and Pomona, May 31, 1939, two performances.

In Pomona the business agent for the American Federation of Actors called out certain acts on strike and the circus immediately closed and the equipment was returned to Baldwin Park, California, and on the 1st day of June, 1939, the Appellants gave notice of rescission, claiming the equipment leased by them was not in "good condition and ready for use" and that this fault compelled the Ap-

pellants to close the show. Appellees have claimed the failure of the show was due to poor management in making poor contracts with sponsors from a financial standpoint, green, inexperienced labor for the circus and not enough time to break them in, and finally the calling out on strike of the band and certain special acts and features, compelling the closing of the show.

The initial payment of $2500.00 due Appellee on delivery of the circus equipment at Inglewood was never paid by Appellant, nor were the four notes of $2500.00 each called for by the agreement ever delivered to Appellee and on November 10, 1939, Appellee filed this action in the United States District Court, Southern District of California, Central Division, for $15,475.14, together with interest thereon.

After a pre-trial hearing on November 25, 1940, in which it was stipulated that the issue would be confined to the condition of the equipment on its delivery, and after a trial of three days before the Court sitting without a jury, the Court found for Appellees and gave judgment to them in the amount of $15,006.07. The defendant (Appellants) have appealed to this Court and the matter is now before them, and this is Appellee's Answering Brief to Appellant's Opening Brief. The matters included in this statement are hereafter referred to in the brief and the page and line of the printed transcript is set out for each fact herein stated.

Summary of Argument.

POINT 1.

In Answer to Appellants' Point III:

Where a case is tried before the Court, the trial judge has the sole right to believe or reject the testimony of a witness, and the sufficiency of evidence to establish a given fact is also a question for the trial court.

POINT 2.

In Answer to Appellant's Points I and VII:

A deleted clause in an instrument or other extrinsic evidence, is inadmissible to show intention, waiver or non-waiver or other interpretation, where the contract is plain, unambiguous and certain, and waiver is a question of fact to be determined by the trier of the facts.

POINT 3.

In Answer to Appellant's Point VI:

The condition and usability of the wagons as a part of the equipment was a question for the trial court.

POINT 4.

In Answer to Appellant's Points II, IV and V:

The submission of weaker evidence when stronger evidence could have been produced, should be viewed with distrust and in any event the trial court is the sole and final judge of the credibility of witnesses and testimony produced, and the knowledge of the agent is knowledge of the principal.

POINT 5.

In Answer to Appellant's Point VIII:

The Court had a right to conclude from the admission of Appellant that one of the reasons for closing the show was the calling out of a number of performers by the business agent of the American Federation of Actors.

POINT 6.

In Answer to Appellant's Points IX, X, XI and XII:

The qualifications of expert witnesses and the admission of opinion evidence is a matter within the discretion of the trial court, and there can be no abuse of that discretion where the trial is before the Court without a jury and the Court only gives the testimony such weight as it ought to have.

POINT 7.

In Answer to Appellant's Point XIII:

There is no need of a finding on an immaterial allegation of the complaint in relation to mitigation of damages, where Appellant submitted no evidence in relation thereto and the stipulation and agreement of the parties confirmed by the Court at the pre-trial hearing limited the issues and did not include "mitigation of damages" as an issue.

POINT I.

In Answer to Appellant's Point III.

Where a Case Is Tried Before the Court the Trial Judge Has the Sole Right to Believe or Reject the Testimony of a Witness and the Sufficiency of Evidence to Establish a Given Fact Is Also a Question for the Trial Court.

In the interest of continuity of thought and as a logical sequence in argument we are answering Appellant's Point III first, because we believe this to be the gist of Appellant's entire argument. Obviously if the "circus equipment" listed by Appellant was as the trial court found,

> "all of the property that was delivered and accepted at Inglewood was in good usable condition" [Pr. Tr. p. 40, lines 28-29],

there is nothing left of Appellant's argument, for all of Appellant's other points are corrollaries to his Point III.

In justification for Appellant's contention that this finding by the trial court is not justified by the evidence, Appellant reviews the testimony of witnesses Eagles, Singleton, Clawson, Austin, Pennock and Graham, and attempts to discredit the testimony of Eagles and Singleton, respectively, the manager and boss canvasman of the Great American Circus and employees of Appellant, and the agents who, with others, inspected, selected and assembled the equipment at Appellant's winter quarters at Baldwin Park prior to the date of the lease agreement. Appellant was not only given an opportunity to inspect, but did in fact, by his authorized agents, inspect and select every piece of the equipment out of the great mass of like equipment belonging to Appellee.

Appellant's criticism of witnesses Eagles and Singleton, and reference to their testimony, is in great part taken from the reporter's transcript and not a part of the printed transcript. (App. Op. Br. pp. 28 to 37.)

We understand that the rules of practice of the Circuit Court of Appeals, Ninth Circuit, to be

> That the Circuit Court will not consider parts of the record not printed.
>
> Rule 19, Subdiv. 6,

and that the Court will not consider the parts of the reporter's transcript cited by Appellant. (We therefore object to consideration of any part of the reporter's transcript.) We shall therefore omit further reference to said portions of Appellant's Opening Brief. Neither shall we consider Appellant's undignified attempt to discredit the witness Eagles by his argument (Op. Br. p. 29) based on matters not in any record, to-wit, that because said witness was a merchant and in the feed business he should not be believed because he wanted to sell feed for the Appellee's circus animals.

Appellant further charges error (Op. Br. p. 35, lines 1 to 4) because the witness Eagles was examined as an adverse witness. We submit that Appellee had every right, the witness being Appellant's manager, to be examined as an adverse witness under the provisions of Section 2055, C. C. P., or Rules of Civil Procedure 43b. No objection to Appellee's request to so examine the witness Eagles was ever made by Appellant, nor did the Court rule on said request. [Pr. Tr. p. 63, line 12.] Nor was the witness asked any question that could not have been asked on direct examination. [Pr. Tr. pp. 63 to 101.] Nor did Appellant ever object to any question asked Mr.

Eagles, except a question calling for an opinion, when the trial court, in answer to the objections, said:

> "The Court: He is giving his ideas as a man familiar with this sort of business and I think it is proper. The Court will only give it such weight as it ought to have anyway." [Pr. Tr. p. 89, lines 6 to 9.]

The appellant made a weak attempt to impeach the testimony of Eagles and Singleton (not contained in the printed record, but cited from reporter's transcript on pages 30, 31, 32, 33, 34 and 37 of Appellant's Opening Brief). Our only answer to this lien of argument is that the trial court heard these witnesses, observed their demeanor on the stand on both direct and cross-examination, and evidently believed them.

In addition, if the testimony of Eagles and Singleton were eliminated, there are still a great number of corroborative witnesses whose testimony is sufficient to support the judgment of the trial court.

The propositions of law contained in our heading to this Point I we believe are so fundamental that it is unnecessary to cite more than a few of a long line of California decisions to sustain them.

> "Under the Code of Civil Procedure the jury, or trial judge sitting in place of a jury, is the exclusive judge of the credibility of a witness."
>
> 10 *Cal. Jur.* 1160, Point 5.

> "Witness presumed to speak the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by

evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

C. C. P., Sec. 1847.

"It is the duty of a reviewing court upon appeal to construe the evidence so as to support the judgment; to accept as true that evidence which tends to sustain the findings and judgment (unless it is inherently incredible) and to reject as untrue the evidence which conflicts therewith. Substantially all of the material facts testified to in behalf of defendants in support of their claim for equitable relief were either directly contradicted by the testimony of the plaintiff himself or were inferentially contradicted by the testimony of other witnesses produced by him. The trial court was the exclusive judge of the credibility of these witnesses."

Neher v. Kauffman, 197 Cal. 674, 242 Pac. 713.

"The amount of credit to be given to the positive testimony of a witness is solely a question for the trial tribunal, except perhaps where the testimony in the light of the undisputed facts is inherently so improbable and impossible of belief as to in effect constitute no evidence at all."

2 *Cal. Jur.* 916, Points 1-2.

"The question of the weight of impeaching evidence was one that was within the province of the trial court."

Weissbaum v. Eibeshutz, 211 Cal. 170 at 174, 294 Pac. 396.

"The question of the credibility of the witness whose testimony given during the trial of this action was sought to be impeached in the manner described was one that was confided exclusively to the determination of the trier of facts."

Goodwin v. Robinson, 20 Cal. App. (2d) 283 at 289, 66 Pac. (2d) 1257.

"Upon appeal, appellants challenge the sufficiency of the evidence to support the finding of the trial court to the effect that the statements made by defendants to plaintiff were false, and known by the defendants to be false, and insist that the evidence shows that such statements were true. We cannot agree with this contention. Having in mind the general rule that all intendments are in favor of the judgment and that this court must accept as true all evidence tending to establish the correctness of the findings as made."

Feckenscher v. Gamble, 12 Cal. (2d) 482 at 492, 85 Pac. (2d) 885.

"It is only in cases where there is no evidence to sustain a finding, or where it can be said, as a matter of law, that the evidence is insufficient to sustain it, that this court has jurisdiction to consider the evidence. It is the exclusive province of the trial court to determine the credibility of the witnesses, and from the conflicting evidence determine the disputed fact. Those principles have been so often reiterated that they have become trite."

Stransky v. Callan, 81 Cal. App. 476 at 487, 253 Pac. 960.

POINT II.

In Answer to Appellant's Points I and VII.

A Deleted Clause in an Instrument or Other Extrinsic Evidence Is Inadmissible to Show Intention, Waiver or Non-Waiver, or Other Interpretation Where the Contract Is Plain, Unambiguous and Certain and Waiver Is a Question of Fact To Be Determined by the Trier of the Facts.

Appellant's Points I and VII are so closely related that, in order to avoid repetition, we shall consider them together under this one heading.

It makes little difference whether Appellant under the pleadings had the burden of proof on the question of whether the leased equipment when delivered at Inglewood was in poor condition and not ready for use, or whether the Appellee should have the burden of proving said property was in good condition and ready for use, for, under the stipulation and order of the Court, the issue was limited to the condition of the equipment when delivered to the defendant [Pr. Tr. p. 39, line 78], and the trial court found, after all evidence had been submitted by both Appellant and Appellee, that

> "all of the property that was delivered and accepted at Inglewood was in good useable condition." [Pr. Tr. p. 40, lines 28-29.]

The agreement of lease between the parties made May 22, 1939, is set out in full [Pr. Tr. pp. 8 to 12], and calls for delivery of the itemized equipment stored and quartered at Baldwin Park, California, to Inglewood on May 23, 1939, in good condition and ready for use.

We submit this contract is plain, unambiguous and certain, and we can see no reason for the introduction of any extrinsic evidence to explain its terms or to show lack of knowledge of its subject-matter on the part of Appellant.

C. C., Sec. 1625;

C. C. P., Sec. 1856.

Appellant is laboring hard to make capital out of a deleted clause in this instrument, to the effect that Appellant had no knowledge of the condition of the equipment, when the facts are shown, without contradiction, the Appellant's agents had already at the time of the agreement, inspected, selected and set up the equipment at Baldwin Park. Eagles, the manager, and Daillard, the coordinator, had started on this work as early as May 19, 1939. [Pr. Tr. pp. 66-67.] Singleton, the "boss canvasman," was already there at that time getting out the paraphernalia, having started such work on the 18th of May, 1939. [Pr. Tr. p. 121, lines 7 to 13.] Nelson, an associate of Fanchon & Marco and manager of the Fair Booking Department and in charge of all arrangements prior to the agreement, together with Daillard, had examined the equipment six or eight weeks before the show opened. [Pr. Tr. p. 116, lines 20-31.] Singleton, the "boss canvasman" in charge of selecting the equipment, had assembled same and put the "big top" up at Baldwin Park prior to the signing of the agreement [Pr. Tr. p. 125, lines 1 to20], in the presence of Daillard and Marco Wolff himself, and it was well known to all that the equipment selected was used, or "second-hand," equipment. [Pr. Tr. p. 125, lines 18 to 30.]

All this argument by Appellant about extrinsic evidence being used in the interpretation of the contract or to show non-waiver and all his cases cited to show that Appellant did not know the condition of the equipment is just a waste of time, for the fact is Appellant did know of the condition of the equipment and the trial court so found. [Pr. Tr. p. 41, lines 16-18.]

The only waiver spoken of by the Court was in relation to certain needed minor repairs, especially to the circus train, and where the cost of such repairs in the amount of $332.22 were charged to Appellee and the charges accepted at the request of Appellant. This particular waiver is fully covered later under this point.

It will be remembered that the equipment in question was well known to all parties prior to the signing of the agreement to be "second-hand," or used equipment, and the express warranty of "good condition" and "ready for use" should be interpreted with the fact in mind that the equipment was second-hand and was to be used in the circus business. Then "good condition" and "ready for use" would be a warranty that the equipment was reasonably adapted to the purposes for which it was leased.

22 Cal. Jur. 999 to 1001, Secs. 72-73.

In this connection we again call the Court's attention that out of the many hundred of articles of equipment leased by Appellant but an infinitesimal number were claimed by Appellant to be unfit for its purpose, and all these were repaired and made fit at Appellee's expense.

The conclusion of the Court [Pr. Tr. p. 45, lines 13 to 21] that Appellant waived any flaws in the equipment

that was reconditioned by them and the cost of which was charged to plaintiff (Appellee) is fully justified under the facts and the law of California.

Appellant confines his objection to the equipment leased under his Point VII to the circus train, consisting of seven flat cars, two stock cars, two coaches and two sleepers, and states they could not be used under Interstate Commerce regulations.

R. V. Kettring, general car foreman for the Santa Fe Railroad, called as a witness for the defendants (Appellants), testified as follows:

> "Q. By Mr. Schaefer: What condition did you find the cars in? A. We found the cars at Baldwin Park in what we would term, in a railroad term, as in fair condition, needing repairs to the safety appliances, air brakes, and the running gear of the cars, to make them safe to move.
>
> Q. Will you state what repairs were made and give the car numbers, if you can, and state why they were made?
>
> The Court: We don't need that. What other defects, if any, did you find in the cars? A. Well, I found several little defects that was in violation of the Interstate Commerce rules, if we would operate the cars over our lines, such as old air lines, wheels with worn flanges. And we had one coach that was—on request of the parties operating the show, they asked us to make repairs—it had a defect in violation of the Interstate Commerce rules, and these repairs were all made to the cars on our repair tracks, prior to their departure for San Diego. The cars were brought back from Inglewood to our repair tracks, and repairs were made.
>
> Q. By Mr. Schaefer: Mr. Kettring, will you look through these bills as quickly as you can and

tell me if they are the original bills that came from the Santa Fe to Fanchon & Marco? A. Yes, sir, they are. They are the original bills." [Pr. Tr. p. 191, line 19, to p. 192, line 18.]

Marco Wolff, the Marco of Fanchon & Marco, the Appellant herein, testified concerning the repairs to the train and to the conversation with Clawson, the agent of Appellant, as follows:

"A. Yes. Clawson told me that he would get the calliope fixed right away, and that the additional cross-pieces for the seats would come out, and the elephant howdahs were not there, and he said he would get us the elephant howdahs right away. He said he didn't have any money and he couldn't fix up the railroad cars, that his credit wasn't good for that, and he asked us to advance the money for that.

The Court: Asked you? A. Yes. And he suggested that we could deduct from our first payment any advances that he might have to make." [Pr. Tr. p. 164, line 21, to p. 165, line 2.]

The bill for these repairs amounted to $332.22. [Pr. Tr. p. 193, lines 1 to 10.] It was then paid by Appellant and charged to Appellee.

The trial court found that:

"This property had been used in the show business, some of it for a number of years. The ropes had been used for one or two years, perhaps two years. The defendant is familiar with the show business and had been in such business for some time. He knew about the ropes, and must have known how long those ropes would likely continue in use. The defendant had in its employ a practical staff of efficient

showmen, who had been engaged in the show business, some for many years." [Pr. Tr. p. 40, lines 11 to 21.]

And, continuing, the Court further found:

"All of the property that was delivered and accepted at Inglewood was in good, usable condition. Some of it was in need of some repairs, which the defendant had made and charged to the plaintiff's account, to be deducted from the first payment due the plaintiff. The railroad cars needed repairs to bring them within the Interstate Commerce requirements. These repairs were made to the cars and, after reconditioning, the cars were delivered at Inglewood." [Pr. Tr. p. 40, line 29, to p. 41, line 6.]

Appellant meticulously followed the statutes of California in relation to hiring personal property, which read as follows:

"A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter."

Civil Code, Sec. 1956.

"If a letter fails to fulfill his obligations, as prescribed by section nineteen hundred and fifty-five, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him."

Civil Code, Sec. 1957.

Having made these repairs, and Appellee having agreed to pay for same, or having, in the language of the Court:

> "assumed to make reconditioning for such needed repairs as were apparent, and charged it to the plaintiff's account with the plaintiff's consent, he waived such reconditioning as is shown to have been necessary and to have been made." [Pr. Tr. p. 45, lines 17 to 21.]

Moreover, waiver is a question of fact and is to be determined by the Court or jury, except when but one inference can be drawn from the facts.

> 25 *Cal. Jur.,* Sec. 8, pp. 932-933;
>
> 27 *R. C. L.* 912;
>
> *Boyd v. Chivers,* 134 Cal. App. 566, 25 Pac. (2d) 878.

> "Appellant also contends that the alleged waiver by defendant should have been submitted to the jury as a question of fact, and that the directed verdict was, therefore, improper. While waiver is a mixed question of law and fact, when, however, but one inference can be drawn from the facts it is not error for the court to charge the jury that these facts constitute waiver."
>
> *Lompoc Produce v. Browne,* 41 Cal. App. 607 at 613, 183 Pac. 166.

> "Furthermore, the finding of the court that there was no waiver is a finding on a question of fact, proof of which rested upon appellant. (Citing cases.) In view of the record in this case we must accept that fact to be true."
>
> *Schick v. Equitable Life Assur. Soc.,* 15 Cal. App. (2d) 28 at 35, 59 Pac. (2d) 163.

POINT III.

In Answer to Appellant's Point VI.

The Condition and Usability of the Wagons as a Part of the Equipment Was a Question for the Trial Court.

The Appellant, under his Point VI, complains of the Court's findings of the condition of the wagons. The evidence showed, concerning the wagons, that after they had been delivered at Inglewood they had been driven several miles in San Diego [Pr. Tr. p. 128, lines 22-23], that they had been hauled out of loose sand, where they had sunk to the wagonbed, by 60 and 80 H.P. caterpillars [Pr. Tr. p. 127, line 115], and then, the next day, on the long haul at Santa Ana, when the wagons were loaded beyond their normal capacity and were hauled by gas motor-powered trucks at great speed [Pr. Tr. p. 156, lines 1-26], the spindle on one of the hubs became heated (one hub out of 104 or one wagon out of 26) and there was no evidence that the wagons during this time were greased until after the show at Santa Ana. We submit that any reasonable mind, after hearing this evidence, would conclude that the wagons, for second-hand equipment, were, when delivered at Inglewood, in a good usable condition.

POINT IV.

In Answer to Appellant's Points II, IV and V.

The Submission of Weaker Evidence When Stronger Could Have Been Produced Should Be Viewed With Distrust and, in Any Event, the Trial Court Is the Sole and Final Judge of the Credibility of Witnesses and Testimony Produced, and the Knowledge of the Agent Is Knowledge of the Principal.

Appellant's Points II, IV and V are in relation to the condition and usability of one item of the equipment, to-wit, the "rope" used to lift the "big top" or main tent to its place. The finding of the Court that

> "all of the property that was delivered and accepted at Inglewood was in good usable condition" [Pr. Tr. p. 40, lines 28-29],

was discussed under Appellant's Point III of his Opening Brief and Appellee's Point I of this Answering Brief, and the arguments made by Appellee therein apply equally to these points relating to the condition of the "rope," as said "rope" is but a minutely small fractional part of "all of the equipment."

Appellant assumes, under his Point II, that the trial court had in mind a wilful suppression of evidence by Appellant. No intimation was ever made by the Court, counsel for Appellee, or anyone else that Appellant wilfully suppressed any evidence. Conjecture of what the Court had in mind is neither useful nor of any force or effect. The language of the Court is sufficient to express the Court's intention, and we submit the finding that

> "all of the property was in good condition"

includes the rope and such finding is amply justified by the testimony of the witness Singleton alone. He had been a "boss canvasman" for 40 years; he bought this particular piece of rope in the first instance; he inspected and selected it as agent of the Appellant; he saw it become fouled in the "blocks" and break when pulled on by an elephant, and he spliced the rope after the break and testified, in answer to a question by the Court, that the rope was in usable condition. We set out the pertinent part of Singleton's testimony, taken from the printed transcript, as follows:

> "Q. When you went out to Baldwin Park when Mr. Nelson first employed you, what did you do out there? A. I proceeded to get the wagons out and get material out, etc., chairs, poles, rigging, canvas; I proceeded to get the show together, to load it in wagons to go to Inglewood. Then I had an order to put the show up in winter quarters.
>
> Q. Let me ask you about putting it up in winter quarters. Do you mean that you set it all up and tested it and tried it out? A. Do you know exactly how much wagon space it would take to load—
>
> Q. Did you lay out the falls? A. I put the big top up. It was all up in the air, and they came out and stopped me and had me tear it down and load it to go to Inglewood.
>
> Q. When did you put it up? A. I think it was Friday, finished it Friday night, some time after dark.
>
> Q. That was the same equipment you loaded to go to Inglewood? A. Yes.
>
> Q. And the same equipment the Great American Circus used? A. Yes.

Q. And it was all up there, and you looked at it in the air, set up, before you left Baldwin Park? A. Yes, sir.

Q. Did anyone else look at it with you? A. Why, Mr. Clawson went over some of this stuff, and Mr. Daillard was around there, and Mr. Marco was all around, looking at the wagons, but I personally supervised the sorting and loading of all the stuff myself." [Pr. Tr. pp. 124-125.]

"The Court: You say, 'I spliced the rope.' What was the condition of the rope where it separated? A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.

The Court: Well, you have answered the question." [Pr. Tr. pp. 131-132.]

and the testimony of the witness Clawson as follows:

"Q. In Pasadena did you have occasion to observe the working of the main fall there? A. I noticed they got the line fouled once or twice there.

Q. There were elephants pulling that line? A. They pulled the cable. The cable goes through the block, and sometimes the cable will foul.

Q. Has an elephant sufficient strength or power to pull a rope like that in two? A. An elephant don't know his strength when he starts to pull.

Q. You believe they could pull the main fall in two, though? A. Yes, I believe he could, very easily.

The Court: You say an elephant is the motive power? A. That pulls the fall up, Your Honor?

The Court: And the rope got fouled? A. It got fouled in a block.

The Court: Where did it tear, between the elephant and where? A. It broke once right on the No. 1 bail ring, and going through the block there it got fouled.

The Court: And broke right at the block? A. I think so. It is pretty hard to tell, but that is the way I think. And they tie that right onto the bail ring." [Pr. Tr. pp. 154-155.]

That the Court was amply justified in his finding by the testimony of the witness Singleton alone is shown by section 1844, C. C. P., which reads as follows:

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason."

C. C. P., Sec. 1844.

The Court said in his finding as follows:

"No part of the broken rope is produced in court as evidence, nor is its absence explained." [Pr. Tr. p. 43, lines 14-15.]

The Appellant concludes from this language that the Court had in mind Sec. 1963, Subdiv. 5, C. C. P. As before pointed out, this conclusion is in no way sustained by any remark of the Court or anyone else. However, the Court could have very properly considered in relation thereto, Sec. 2061, Subdivs. 6-7, C. C. P., which read as follows:

"6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

"7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

Sec. 2061, Subdivs. 6-7, C. C. P.

Or Section 1963, Subdivision 6, C. C. P., in relation to disputable presumption, which reads as follows:

"6. That higher evidence would be adverse from inferior being produced."

Sec. 1963, Subdiv. 6, C. C. P.

Appellant failed to set out in full the trial court's finding in relation to this rope, and we continue where Appellant left off as follows:

"At the time of the breaking of the rope the man who was in charge of that department was an old showman. He was working in his line of business in making this exhibition. If that had broken because of dry rot, he would have discovered it, and he would have reported it to the defendant, and a part of the rope, or the broken part, would have been saved as a matter of protection to the defendant. But this was not done." [Pr. Tr. pp. 43-44.]

We submit that if the rope was successfully spliced without the removal of any part of it, this in itself was evidence that there was no dry rot in the part that was spliced, and if at the time of the trial it was in possession of Appellee as claimed by Appellant, it could have been obtained by Appellant by the use of slight diligence in discovery under Rule 34 of the Federal Rules of Civil Procedure, or by subpoena *duces tecum* under Sec. 1985 C. C. P. At least it was in Appellant's power to obtain possession of the rope.

The rule is well stated in a note to 70 A. L. R., p. 1326, as follows:

> "It has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it and without satisfactory explanation he fails to do so, the jury may draw the inference that it would be unfavorable to him."

Citing:

10 R. C. L., p. 884.

And this rule is restated in 20 Am. Jur., p. 188, Sec. 183.

And in a very recent case it was held the production of weak evidence when strong is available, can lead only to the conclusion that the strong would have been adverse, and silence then becomes evidence of the most convincing character.

Int. Circuit v. United States, 306 U. S. 208, 83 L. Ed. 610, 59 S. Ct. 467.

The case of *Estate of Moore,* 180 Cal. 570 at 585, also reported in 182 Pac. 285 (cited by App. Op. Br. p. 24, line 6), is a case on wilful suppression of evidence, and not in point.

We have no quarrel with the rule enunciated in the other cases cited by Appellant, to-wit, *Hiner v. Olson,* 23 Cal. App. (2d) 227, at 234, also reported in 72 Pac. (2d) 890, on rehearing 73 Pac. (2d) 945, and the case of *Tieman v. Red Top Cab Co.,* 117 Cal. App. 40 at 46, also reported in 3 Pac. (2d) 381, and recite them as sustaining our position, and it is with a feeling of charity that we call attention to the first sentences on pages 24-25 of Appellant's Opening Brief as evidently a mistake, although we agree with the conclusions therein stated.

Appellant's objections set forth under his Point IV apparently are made to that part of the Court's finding reading as follows:

> "This property had been used in the show business, some of it for a number of years. The ropes had been used for one or two years, perhaps two years. The defendant is familiar with the show business, and had been in such business for some time. He knew about the ropes, and must have known how long those ropes would likely continue in use. The defendant had in its employ a practical staff of efficient showmen, who had been engaged in the show business, some for many years." [Pr. Tr. p. 40, lines 11-20.]

And Appellant again uses the reporter's transcript (we renew our objection to this practice on the part of Appellant), to show by the testimony of Mr. Daillard, the "coordinator" of the Great American Circus, that he was an experienced theatre man but not a circus man. It may be conceded that neither Daillard nor Wolff were qualified as expert circus men, but the fact is undisputed that they employed a number of circus men of many years experience to act as their agents and managers of the various departments of the circus, men who were familiar with this particular equipment.

Singleton, the "boss canvasman" for the Great American Circus, testified in answer to a question by the Court as follows:

> "The Court: You say, 'I spliced the rope.' What was the condition of the rope where it separated?
>
> A. The rope was in usable condition. I bought the rope myself and had been using it. I had been handling this property since 1937, and had replaced new rope from time to time, and rebuilt seats and poles, and whatever was necessary.

The Court: Well, you have answered the question."
[Pr. Tr. pp. 131-132.]

And the further fact that Singleton was able himself to splice the broken rope so that it not only held for the show in Pasadena but also at Pomona the next and last performance, would indicate familiarity with the condition of ropes.

We submit that it is a fundamental and well-settled rule of law, that the knowledge of the agent in the course of his agency is the knowledge of the principal.

1 Cal. Jur. 846, Sec. 125, Point 8;

Faires v. Title Ins. & Trust Co., 15 Cal. App. (2d) 350, at p. 354, 59 Pac. (2d) 428.

"As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

Sec. 2332 C. C.

Appellant's argument under his Point V is but a repetition of the argument under Points II and IV and we feel that it has been answered heretofore. Most of the testimony cited by Appellant in his Point V is taken from the reporter's transcript. (Op. Br. pp. 45, 46, 47.) (We again object to the consideration of testimony not in the printed transcript.) Suffice it to say, that of the three witnesses whose testimony is referred to in the Opening Brief, page 45, lines 3 and 4, Guice, the trapeze artist, Priest, the hardware man, and Singleton, the "boss canvasman" who spliced the rope in question, the Court evidently believed that Singleton knew more about the condition of this particular rope than the others.

POINT V.

In Answer to Appellant's Point VIII.

The Court Had a Right to Conclude From the Admission of Appellant That One of the Reasons for Closing the Show Was the Calling Out of a Number of the Performers by the Business Agent of the American Federation of Actors.

The admission of Appellant that the reason for closing the show was as contained in their telegram sent the last night of performances at Pomona, May 31st, 1939, to fourteen sponsors under contract with Appellant, which telegram reads as follows:

> "Kramer of American Federation of Actors has called out acts which are members of his organization. This and other labor difficulties which have caused us to miss matinee performances in Santa Ana and Pasadena necessitates us advising you with regret we will be unable to fulfill contract for Circus performance. One of our men will contact you later." [Pr. Tr. p. 259, lines 4-11.]

However, this was not the sole reason for closing the show. The trial court in its conclusions, gives another very cogent reason, to-wit:

> "Operating the show for a week at a net loss of $23,323.93." [Pr. Tr. p. 45, lines 10, 11, 20.]

Nowhere in the telegram is "faulty equipment" stated as a reason for closing the show or missing performances.

The strike and other labor difficulties are given as the sole reasons for closing the show.

We submit that Appellant's real objection to the conclusion of the trial court is that the Court failed to find that a reason for closing the show was "faulty equipment", and Appellant's self-serving argument (Op. Br. pp. 53-54) as to its fairness and honesty in not availing themselves sooner of the "strike" clause in their contracts with sponsors [Pr. Tr. p. 254, Par. 7], is more ludicrous than logical. Also, their reiteration or exaggerated claims of faulty equipment, when their evidence at its best showed one wagon wheel out of 104 ran dry after the wagon had been pulled out of the sand, hub-deep, by caterpillars in San Diego, and one rope broke when it became fouled and pulled on by an elephant. All of these contentions were disposed of by the Court in its finding contrary to the Appellant's claims. The Court made up its mind from all the evidence and facts. The items complained of were infinitesimal matters in any event, when one considers the vast amount and mass of equipment carried by a big three ring circus, the quantity and nature of which has become an American idiom for intricacy and variety.

POINT VI.

In Answer to Appellant's Points IX, X, XI and XII. The Qualifications of Expert Witnesses and the Admission of Opinion Evidence Is a Matter Within the Discretion of the Trial Court, and There Can Be No Abuse of That Discretion Where the Trial Is Before the Court Without a Jury and the Court Only Gives the Testimony Such Weight as It Ought to Have.

Appellant's objections under Points IX, X, XI and XII as set out in his Opening Brief, being pages 55 to 58 inclusive, we believe can be properly considered and answered under one heading. These objections relate to the testimony of Paul Eagles, J. V. Austin and Pat Graham, on the condition and suitability of the circus equipment leased by Appellant.

Paul Eagles testified as to his qualifications as an expert on circus equipment as follows:

> "Q. During the past years of your life have you had any connection with circuses or a circus? A. Yes.
>
> Q. Will you relate to the court what that connection was? A. I have been purchasing agent and had various jobs, and also business manager, and manager.
>
> Q. For what period of time? A. Well, over a period of approximately 25 years.
>
> Q. And for what circuses did you engage in those activities during that period of time? A. Well, Al G. Barnes.
>
> Q. Relate to the court approximately what years, and what you did for Al G. Barnes. A. Well, I was purchasing agent and I was business manager.

Mr. Schaefer: I am sorry. I can't hear, Your Honor.

The Court: Speak so that all of us can hear you.

A. I was purchasing agent and I was business manager.

Q. By Mr. Combs: And for what years, Mr. Eagles? A. The last year was 1938.

Q. What was the first year? A. Oh, about 1915 or 1914, in there.

Q. Subsequent to 1938 what circus did you work for, if any? Did you say 1928 or 1938? A. 1938.

Q. Subsequent to that year— A. Mostly with Al G. Barnes.

Q. Did you ever work for the Great American Circus? A. Yes.

Q. What year? A. In 1939.

Q. In what connection? A. Manager." [Pr. Tr. p. 63, line 25, to p. 64, line 31.]

"Q. Was there anything else you did on that first day, that you recall? A. Got all the stuff together and started putting it all together.

Q. Did you lay out the tent rigging, blocks and falls? A. Singleton did.

Q. Did you direct him to do it on that day? A. Yes.

Q. Did you examine the poles for the circus? A. Yes.

Q. All of this equipment was second-hand or used circus equipment, was it not? A. It was.

Q. You knew that fact at least as early as the 19th of May, did you not? A. Yes.

Q. In fact you knew it prior to that time, did you not? A. I had it under sub-lease from No-

vember 1938 until around the middle of March, or later, possibly.

Q. Of 1939. A. Yes, sir.

Q. You were very familiar with all of this equipment? A. Yes, sir.

Q. Including both what was taken by Fanchon & Marco for the Great American Circus and that which was not taken; is that correct? A. That is right." [Pr. Tr. p. 70, line 13, to p. 71, line 9.]

J. V. Austin testified as to his qualifications as follows:

"Q. By Mr. Combs: What is your occupation, Mr. Austin? A. Showman.

Q. How long have you been engaged in that business? A. About 40 years.

Q. And in that connection what shows have you been involved with, as such showman? A. John Robinson's; Hagenbeck- Wallace; Al G. Barnes; Sells-Floto; Ringling Brothers; Barnum & Bailey; and the Great American Circus.

Q. What capacities did you work for those organizations in? A. From advertising agent to manager.

Q. Practically every capacity of an executive nature? A. Most every one.

Q. And in that connection did you become very familiar with the operation and complete activities and functions of circuses? A. Necessarily." [Pr. Tr. p. 223, line 23, to p. 224, line 12.]

Pat Graham testified as to his qualifications as follows:

> "What is your occupation? A. Circus employee.
>
> Q. How long have you been engaged in that capacity? A. 19 years.
>
> Q. What character of work did you undertake during that 19 years? A. All the way from cook house punk up to head porter.
>
> Q. For what circuses? A. I started on the John Robinson Show; Sells-Floto; Hagenbeck-Wallace; Sells Brothers; Al G. Barnes; McCullough Brothers.
>
> Q. Did you work for the Great American Circus? A. Yes, I did." [Pr. Tr. p. 275, lines 6 to 19.]

It will be remembered that all these witnesses were employees of the Appellant and worked with the Great American Circus during its operation, and the witnesses Paul Eagles and Pat Graham worked on and helped select the equipment used under the lease by the Great American Circus.

It is hard to conceive how a witness could be better qualified to give an expert opinion of the useability and condition of the circus equipment in the instant case than Paul Eagles. He had worked as purchasing agent, business manager, and manager, and in various other capacities in the circus business, for 25 years and had been manager of the famous Al G. Barnes Circus for more than 20 years, and was the manager of the Appellant's circus, and had not only carefully and minutely examined the equipment but had selected the portions to be used by his employer, the Great American Circus, the appellant herein. These qualifications apply equally to J. V. Austin,

of 40 years experience, and Pat Graham, of 19 years experience.

Appellant correctly states in his Opening Brief, page 57, lines 7 to 12, that the basis for opinion of expert testimony in California is *Section 1870, Subdivision 9, C. C. P.*, and the interpretation of said section by the Supreme Court in the case of *Vallejo v. Reed Orchard Company,* 169 Cal. 545, also reported in 170 Pac. 426. In that case, neither the qualifications of the expert witnesses who were allowed to testify, nor the qualifications of the witness whose testimony was refused by the trial court, are set out in the exhaustive opinion but the rule announced therein has been followed by the Appellate Courts of California in a long line of decisions ever since. This rule is set out at page 575 as follows:

> "The question whether or not a witness is qualified to give his opinion, as evidence upon a matter in issue, is submitted to the trial judge in the first instance, and is to be determined by him before such opinion may be given. (Fairbank v. Hughson, 58 Cal. 314.) It is, in itself, in the nature of a trial of a question of fact, by evidence addressed to the judge alone, and, as in other decisions on questions of fact by a trial court, his ruling thereon is a matter of discretion and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. (Howland v. Oakland etc. Co., 110 Cal. 521, (42 Pac. 983); Mabry v. Randolph, 7 Cal. App. 427, (94 Pac. 403).) If there is any substantial evidence to sustain the ruling, the exception thereto will be disallowed."
>
> *Vallejo etc. v. Reed Orchard Co.,* 169 Cal. 545, at 575, 170 Pac. 426.

The opinions of the witnesses in the instant case as to the condition and useability of said equipment, were in no way binding upon the Court, for

> "It is not mandatory that the trial court accept the conclusions of an expert, even though it is uncontradicted."
>
> *First National Bank v. Caldwell,* 84 Cal. App. 438, at 447, Point 9, 258 Pac. 411.

The cases cited by Appellant under Points XI and XII (App. Op. Br. p. 58), fully sustain the position of Appellee and the trial court's ruling. *Howland v. Oakland etc.,* 110 Cal. 513, also reported in 42 Pac. 983, holds as follows:

> "We cannot say the court abused its discretion in holding that the witness McCarthy had shown himself sufficiently qualified to answer the hypothetical question, tending to elicit his opinion as to whether the car of appellant could, with proper care and attention, have been stopped in time to avoid the collision. This is a question largely for the determination of the trial judge, and his ruling will not be disturbed except error clearly appears."
>
> *Howland v. Oakland etc.,* 110 Cal. 513, at 521, 42 Pac. 983.

In *Kinsey v. Pacific Mutual Life Ins. Co.,* 178 Cal. 153, also reported in 172 Pac. 1098 (App. Op. Br. p. 58), the question of qualifications of life guards to express their opinion as to whether the appearance of the deceased was indicative of death by drowning was ruled upon by the trial court and the trial court refused to accept their

qualifications, the Supreme Court on appeal sustained the trial court in the following language:

> "As to whether or not they were thus qualified was question for the determination of the trial judge, and in the absence of an abuse of discretion disclosed by the record, his ruling should not be disturbed."
>
> *Kinsey v. Pacific Mutual etc.,* 178 Cal. 153, at 156, 172 Pac. 1098.

In *Dobbie v. Pacific Gas & Elec.,* 95 Cal. App. 781, also reported in 273 Pac. 630 (App. Op. Br. p. 58), there was no question of the qualification of the witness. The Appellate Court in sustaining the trial court, merely held that the question asked did not call for "opinion evidence", and further said:

> "The admission or exclusion of such evidence rests largely within the discretion of the trial court, which in the present instance was not abused."
>
> *Dobbie v. Pacific Gas & Elec.,* 95 Cal. App. 781, at 792, 273 Pac. 630.

The language of the rulings of the trial court in the instant case clearly shows that the Appellant suffered no harm from the admission of the testimony of Paul Eagles.

> "The Court: He is giving his ideas as a man familiar with this sort of business, and I think it is proper. The Court will only give it such weight as it ought to have anyway." [Pr. Tr. p. 89, lines 6-9.]

And in answer to the objection made against testimony of Pat Graham:

> "The Court: The Court will consider it if it has any value." [Pr. Tr. p. 280, lines 25-26.]

POINT VII.

In Answer to Appellant's Point XIII.

There Is No Need of a Finding on an Immaterial Allegation of the Complaint in Relation to Mitigation of Damages, Where Appellant Submitted No Evidence in Relation Thereto and the Stipulation and Agreement of the Parties Confirmed by the Court at the Pretrial Hearing, Limited the Issues and Did Not Include "Mitigation of Damages" as an Issue.

In answer to Appellant's Point XIII of his Opening Brief, we submit that the allegation of Appellee's complaint referred to, to-wit, "that plaintiff made every endeavor during the remainder of the term of said contract to let said property to others but was unable so to do", is an immaterial allegation or surplusage, and its insertion is merely an anticipation of a defense. It was not even necessary for Appellant to deny the same, and his denial raised no issue nor shifted the burden of proof from Appellant to Appellee on a matter which Appellant admits that proof of "mitigation of damages" rests upon the defendant (Op. Br. p. 59, lines 10-12).

Appellant's admission, however, is but a re-statement of the well-settled law of California that "the burden of showing facts in mitigation of damages rests upon the defendant".

Andersen v. La Rinconada Country Club, 4 Cal. App. (2d) 197, at 201, Point 4, 40 Pac. (2d) 571;

Vitagraph, Inc. v. Liberty Theatre Co., 197 Cal. 694, at 699, Point 2, 242 Pac. 709.

Where in a suit upon a contract, plaintiff alleged that he had performed all the conditions of the contract on his part to be performed and defendant denied this allegation and urged upon appeal that it was incumbent upon plaintiff to prove the allegation, the Appellate Court said in affirming the decision for plaintiff:

> "In the first place, the complaint stated a complete cause of action without Paragraph IV, and the contract being pleaded in terms and not being set forth in full, Paragraph IV may be considered as surplusage, or at least an immaterial allegation which it is not necessary to deny. (21 Cal. Jur. 143.)"
>
> *Easom v. General Mortgage Co.,* 101 Cal. App. 186, at 190, Point 3, 281 Pac. 514.

Appellant presented no evidence concerning mitigation of damages and he should not now be heard to complain, when the duty rested upon Appellant to have presented evidence of this character.

Where an objection on appeal that the trial court failed to take into account matters of mitigation of damages when the Appellant had offered no evidence on such "mitigation", the Appellate Court said:

> "It does not appear from the record that any independent evidence was presented to the trial court heard relative to the value of these elements. Appellant will not now be heard to complain that the court failed to take into account elements in mitigation of damages, when the duty rested upon it to have presented evidence of this character."
>
> *Kramer v. Associated Almond Growers,* 111 Cal. App. 595, at p. 600, Point 5, 295 Pac. 873.

The cases cited by Appellant to sustain his argument that the burden of proof shifted from Appellant to Appellee are warehouse or bailment cases, and in each case the burden was held to be with the defendant. The first case, *Wilson v. Crown Transportation,* 201 Cal. 701, also reported in 258 Pac. 596, was decided on the application and construction of Sec. 8 of the Warehouse Receipt Act, Statutes 1909, page 437, and that part of Sec. 8 which reads as follows:

> "In case the warehouseman refuses or fails to deliver the goods in compliance with the demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal,"

the Court saying at page 707:

> "It would be difficult to give a reasonable construction to the statute without attributing to it the force of placing the burden of proof for failure to deliver on the warehouseman."

The other cases cited are either warehouseman or bailment cases, the rule of law being the same in either case.

This question of "pleading", however, in the instant case is a moot one, for upon stipulation of the parties at the pretrial hearing the issue was limited as follows:

> "The issue will be limited to the condition of the equipment when delivered to the defendant and to losses, if any, recoverable that were occasioned by the deficiency of the equipment, if any." [Pr. Tr. p. 39, lines 7 to 10.]

There was never any modification of the stipulation at the trial.

A pretrial stipulation is binding, unless modified at the trial.

Federal Rules Civil Procedure, Rule XVI.

> "At the pretrial conference, it was stipulated that Florida was the place of the making of the contract and the stipulation was made a part of the pretrial order. This pretrial stipulation is binding unless modified at the trial. (Federal Rules Civil Procedure, Rule XVI.) At the trial there was evidence from which it could be inferred that the contract was executed in Texas but the order was not modified and we hold the stipulation is binding."
>
> *Ringling Bros.-Barnum & Bailey Combined Shows v. Olvera,* 119 Fed. (2d) 584, decided May 2, 1941.

Conclusion.

In conclusion Appellee submits:

The Appellants herein not only had an opportunity to inspect and examine the property leased by them, but by their authorized agents did inspect, examine and select the equipment leased to them prior to the signing of this agreement. That Appellees fulfilled every requirement of this contract and Sec. 1955 of the California Civil Code. The equipment as found by the Court was in good condition and ready for use at the time of delivery and Appellants paid the expense of repairs to such minor articles as were requested by Appellants. There was no concealment of any kind on the part of Appellee. That the issues in the case were confined to the question of condition of the equipment at the time of delivery by stipulation and pretrial order of the Court. The trial court is the sole judge of the credibility of witnesses and the suf-

ficiency of the evidence to sustain its findings. The qualification of expert witnesses and the admission of opinion evidence is also a matter within the discretion of the trial court. None of the rulings of the trial court in regard to the admission of evidence which was objected to by appellant were harmful and if error it was harmless. The finding by the Court that Appellant had waived any objection to that part of this equipment which was repaired at the expense of Appellee was fully justified by the evidence and the law and the finding that Appellant knew of and was familiar with the circus business through its agents of long experience in this business is fundamentally sound. And finally, the trial court heard all the witnesses, observed their demeanor on the stand and examined the written documents introduced in evidence, and the trial court's finding and conclusion thereon should be sustained under Section 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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